No. 17-204

In the Supreme Court of the United States

APPLE INC., PETITIONER

v.

ROBERT PEPPER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether respondents can seek treble damages under Section 4 of the Clayton Act, 15 U.S.C. 15, based on their claim that Apple has monopolized the distribution of iPhone apps, where respondents were injured by Apple's conduct only to the extent that third-party app developers passed on Apple's allegedly supracompetitive commission in setting the prices that respondents paid.

TABLE OF CONTENTS

Page

Interest of the United States 1
Statement 1
Discussion 5
A. The court of appeals misapplied the *Illinois Brick* rule 6
1. Under *Illinois Brick*, a plaintiff cannot state a claim for treble damages under Section 4 of the Clayton Act by alleging that the defendant unlawfully overcharged a third party and that the third party passed on the overcharge to the plaintiff 7
2. Respondents' treble-damages claim is barred by *Illinois Brick* 13
3. The court of appeals' analysis reflects a misreading of *Illinois Brick* 14
B. The decision below conflicts with the Eighth Circuit's decision in *Campos* 19
C. The question presented warrants this Court's review 21
Conclusion 22

TABLE OF AUTHORITIES

Cases:

California v. *ARC Am. Corp.*, 490 U.S. 93 (1989) 12
Campos v. *Ticketmaster Corp.*, 140 F.3d 1166 (8th Cir. 1998), cert. denied, 525 U.S. 1102 (1999) 5, 12, 19, 20
Cargill, Inc. v. *Monfort of Colo., Inc.*, 479 U.S. 104 (1986) 12
Hanover Shoe, Inc. v. *United Shoe Mach. Corp.*, 392 U.S. 481 (1968) 4, 7, 8, 15, 16, 17

Cases—Continued: Page

Illinois Brick Co. v. *Illinois*, 431 U.S. 720 (1977) ..... *passim*
Kansas v. *UtiliCorp United Inc.*, 497 U.S. 199 (1990) 4, 10, 11, 15, 18
McCarthy v. *Recordex Serv., Inc.*, 80 F.3d 842 (3d Cir.), cert. denied, 519 U.S. 825 (1996) 12
Riley v. *California*, 134 S. Ct. 2473 (2014) 2

Statutes:

Clayton Act, 15 U.S.C. 12 *et seq.*:
15 U.S.C. 15 (§ 4) ..... *passim*
15 U.S.C. 15(a) 1, 7
15 U.S.C. 26 (§ 16) 11
Sherman Act, 15 U.S.C. 2 (§ 2) 3

Miscellaneous:

Antitrust Modernization Commission, *Report and Recommendations* (Apr. 2007) 12, 13
2A Phillip E. Areeda et al., *Antitrust Law: An Analysis of Antitrust Principles and Their Application* (4th ed. 2014) 13

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INTEREST OF THE UNITED STATES

This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be granted.

STATEMENT

Section 4 of the Clayton Act authorizes an award of treble damages to "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws." 15 U.S.C. 15(a). In *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977), this Court held that Section 4's treble-damages remedy is not available to a plaintiff who relies on a "pass-on theory" of injury—that is, an allegation that the antitrust violator unlawfully overcharged a third party, and that the third party then passed on the overcharge to the plaintiff. *Id.* at 736. This case concerns the application of the *Illinois Brick* rule to a Section 4 suit brought by purchasers of

iPhone apps who allege that Apple has unlawfully monopolized the market for iPhone app distribution.

1. Apple introduced the iPhone in 2007. Pet. App. 2a. Shortly thereafter, it launched the App Store, an electronic marketplace that allows users to download iPhone apps. *Ibid.* The available apps now include games, messaging services, web browsers, and a vast array of other programs. *Ibid.*; see *Riley* v. *California*, 134 S. Ct. 2473, 2490 (2014) ("[T]he phrase 'there's an app for that' is now part of the popular lexicon.").

Apple itself created some of the apps available in the App Store, but most were developed by third parties. Pet. App. 2a. Each third-party developer chooses the prices that will be charged for its apps in the App Store, and it can opt to make those apps available for free. *Id.* at 2a, 26a. If a developer decides to charge a price, Apple takes a 30% commission on each sale. *Id.* at 2a-3a. A user who purchases an app (or a license for an app) pays the full price to Apple. *Id.* at 2a-3a, 26a-27a. Apple retains 30% of that amount and remits the balance to the developer. *Id.* at 3a, 26a. Apple does not take ownership of third-party apps sold through the App Store, but instead acts as the developers' agent and completes the sales on their behalf. *Id.* at 20a.[1]

Apple intends the iPhone to be a "closed" system. Pet. App. 2a. Apple prohibits developers from selling iPhone apps directly to consumers, or from distributing apps through any channel other than the App Store. *Id.*

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[1] Because this case arises on a motion to dismiss, we describe the facts as alleged in respondents' complaint. Pet. App. 2a. To the extent the parties dispute what the complaint is fairly read to allege, we rely on the reading adopted by the district court and left undisturbed by the court of appeals. See Pet. Reply Br. 2-3.

at 3a. Apple also discourages iPhone users from installing apps obtained from other sources. *Ibid.*

2. Respondents are iPhone users who purchased apps through the App Store. Pet. App. 46a. In 2011, they filed this putative class action against Apple. *Id.* at 3a. Their operative complaint alleges that Apple violated Section 2 of the Sherman Act, 15 U.S.C. 2, by monopolizing the distribution of iPhone apps. Pet. App. 3a. Respondents further allege that Apple's 30% commission is supracompetitive, and that they "have been injured by Apple's anticompetitive conduct because they paid more for their iPhone apps than they would have paid" in a market in which developers could distribute apps through other channels. *Id.* at 53a. Along with other relief, respondents seek to recover three times the amount of the alleged overcharges under Section 4 of the Clayton Act. *Id.* at 63a.

The district court dismissed respondents' complaint, holding that their Section 4 claim is barred by *Illinois Brick*. Pet. App. 23a-37a. The court explained that, although respondents' allegations are somewhat unclear, their complaint "is fairly read to complain about a fee created by agreement" between Apple and third-party app developers under which the developers agree "to pay Apple 30% from their own proceeds." *Id.* at 36a. Accordingly, the court observed, Apple's 30% commission is "borne *by the developers*" in the first instance and then "passed-on to [users] as part of the purchase price" the developers set. *Ibid.* The court therefore held that respondents' damages claim rests on the type of pass-on theory that this Court disapproved in *Illinois Brick*. *Id.* at 36a-37a.

3. The court of appeals reversed. Pet. App. 1a-22a. As relevant here, the court held that respondents' claim

is not barred by *Illinois Brick* because Apple functions as a distributor of iPhone apps. *Id.* at 13a-21a.

The court of appeals began by reviewing this Court's decisions in *Illinois Brick*; in *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968); and in *Kansas* v. *UtiliCorp United Inc.*, 497 U.S. 199 (1990). Pet. App. 13a-17a. The court explained that, in both *Illinois Brick* and *Hanover Shoe*, "a monopolizing or price-fixing manufacturer sold or leased a product to an intermediate manufacturer at a supracompetitive price," and the intermediate manufacturer "used that product to create another product, which was ultimately sold to the consumer." *Id.* at 16a. The court similarly characterized *UtiliCorp* as a case in which "a monopolizing producer sold a product to a distributor at an allegedly supracompetitive price," and "[t]he distributor then sold the product to the consumer." *Ibid.* The court of appeals read those decisions to establish a rule that consumers may not sue a "manufacturer or producer" with which they have no direct dealings, but may sue an "intermediary" with which they deal directly, whether that intermediary is an "intermediate manufacturer" or a "distributor." *Id.* at 17a.

Based on that understanding, the court of appeals framed the dispositive question in this case as "whether Apple is a manufacturer or producer, or whether it is a distributor." Pet. App. 17a. The court concluded that *Illinois Brick* does not bar respondents' suit because "Apple is a distributor of the iPhone apps, selling them directly to purchasers through its App Store." *Id.* at 21a.

The court of appeals identified several specific factors that did *not* affect its analysis. First, the court did not decide whether app developers could bring their own Section 4 suit seeking treble damages from Apple

based on the same allegedly supracompetitive commission that is at issue here. Pet. App. 20a. Second, the court did not rely on the fact that iPhone users pay Apple, "which then forwards the payment to the app developers." *Ibid.* The court explained that it would have reached the same result if users paid the entire purchase price directly to developers, and developers then separately paid Apple its commission. *Ibid.* Third, the court deemed it irrelevant that Apple receives a fixed commission, rather than "tak[ing] ownership of the apps and then sell[ing] them to buyers after adding a markup," as a traditional retailer would. *Ibid.* Fourth, the court considered it immaterial that the price for an app is determined "by the app developer" rather than by Apple. *Id.* at 21a.

The court of appeals thus emphasized that it "rest[ed] [its] analysis" solely on what it perceived to be "the fundamental distinction between a manufacturer or producer, on the one hand, and a distributor, on the other." Pet. App. 21a. The court framed its holding in those terms, concluding that "[b]ecause Apple is a distributor, [respondents] have standing under *Illinois Brick*." *Ibid.* The court acknowledged that the Eighth Circuit had reached the opposite result in a case "closely resembling" this one. *Id.* at 18a (discussing *Campos* v. *Ticketmaster Corp.*, 140 F.3d 1166 (1998), cert. denied, 525 U.S. 1102 (1999)). The court "disagree[d] with the [Eighth Circuit] majority's analysis," however, and instead endorsed the *Campos* dissent. *Id.* at 19a.

DISCUSSION

The Court should grant the petition for a writ of certiorari. The court below departed from this Court's precedents and created a circuit conflict by holding that respondents are entitled to seek treble damages under

Section 4 of the Clayton Act because Apple functions as a "distributor." Under the rule articulated in *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977), the availability of a Section 4 claim does not depend on the defendant's functional role. Rather, the Court in *Illinois Brick* held that a plaintiff cannot state a claim for treble damages under Section 4 by relying on a "pass-on theory," *i.e.*, by alleging that the defendant unlawfully overcharged a third party and that the third party passed on all or part of the overcharge to the plaintiff. Because respondents' claim of injury is predicated on such an allegation, it is foreclosed by *Illinois Brick*. And in allowing respondents' treble-damages claim to go forward, the court of appeals rejected the Eighth Circuit's view on an important question of federal antitrust law. This Court should resolve that acknowledged conflict.

A. The Court Of Appeals Misapplied The *Illinois Brick* Rule

In *Illinois Brick*, this Court held that Section 4's treble-damages remedy is not available to a plaintiff who asserts that it paid more than it should have because a third party passed on the defendant's supra-competitive prices. Respondents' damages claim is barred by *Illinois Brick* because it rests on the assertion that third-party app developers would have set lower prices for their apps if Apple had charged a commission of less than 30%. The court of appeals did not dispute that respondents' claim necessarily rests on that pass-on theory. Instead, the court held that the *Illinois Brick* rule allows that sort of derivative claim to go forward because "Apple is a distributor from whom [respondents] purchased directly." Pet. App. 17a. That holding reflects a misunderstanding of this Court's decisions.

1. Under Illinois Brick, *a plaintiff cannot state a claim for treble damages under Section 4 of the Clayton Act by alleging that the defendant unlawfully overcharged a third party and that the third party passed on the overcharge to the plaintiff*

Section 4 of the Clayton Act provides that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor * * * and shall recover threefold the damages by him sustained." 15 U.S.C. 15(a). In three decisions articulating what has come to be known as the *Illinois Brick* rule, this Court has construed that language to prohibit the use of pass-on theories by both plaintiffs and defendants.

a. In *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968), the Court rejected an asserted pass-on defense to a Section 4 action. In that case, a shoe manufacturer (Hanover) sued a manufacturer of shoe-making machines (United), alleging that United had monopolized the market and had overcharged Hanover for the use of its machines. *Id.* at 483-484. The district court agreed and awarded Hanover three times the amount of the overcharge. *Id.* at 487. In this Court, United argued that Hanover had not been "injured in [its] business or property," 15 U.S.C. 15(a), because it had passed on the overcharge to its customers by increasing "the price charged for shoes." *Hanover Shoe*, 392 U.S. at 487-488. The Court rejected that pass-on defense as a matter of law, holding that a plaintiff that was unlawfully overcharged by an antitrust violator "is equally entitled to damages" even if it has passed on the overcharge to its own customers. *Id.* at 489. The Court gave two reasons for that holding.

First, the Court believed that establishing the extent to which a plaintiff had passed on the defendant's overcharge would entail "insurmountable" problems of proof and would impede the resolution of treble-damages actions with "massive evidence and complicated theories." *Hanover Shoe*, 392 U.S. at 493. The Court stated that "[a] wide range of factors influence a company's pricing policies," and that it would be difficult or impossible to determine whether a plaintiff had raised its prices because of the defendant's overcharge or for other reasons. *Id.* at 492. The Court also expressed the view that it would be "[e]qually difficult to determine" the extent to which such a price increase had been offset by a reduction in the plaintiff's sales. *Id.* at 493.

Second, the Court believed that permitting pass-on defenses would "substantially reduce[]" the deterrent effect of treble-damages suits. *Hanover Shoe*, 392 U.S. at 494. The Court recognized that the economic burden of an antitrust violation will often be borne by the "ultimate consumers" in the chain of distribution—in *Hanover Shoe*, retail consumers who had bought "single pairs of shoes." *Ibid.* But while acknowledging that those retail consumers in the aggregate might ultimately bear the brunt of the overcharge, the Court was concerned that each consumer would have "only a tiny stake in a lawsuit and little interest in attempting a class action." *Ibid.*

b. In *Illinois Brick*, the plaintiffs alleged that they had been "injured in [their] business or property" within the meaning of Section 4 when an illegal overcharge was passed on to them. 431 U.S. at 729. Illinois and a group of local governments sued manufacturers of concrete blocks, alleging that those manufacturers had fixed the prices charged to contractors and that the contractors

had passed on the overcharge to government entities in setting prices for construction work. *Id.* at 726-727. This Court held that, just as "a pass-on theory may not be used defensively by an antitrust violator" to reduce the damages owed to a "direct purchaser plaintiff" that had paid the violator's supracompetitive prices, such a theory may not be "used offensively by an indirect purchaser plaintiff" who alleges that it was overcharged when the violator's supracompetitive prices were passed on by intermediaries like the contractors in that case. *Id.* at 726; see *id.* at 736.

The *Illinois Brick* Court described *Hanover Shoe* as holding that "a direct purchaser suing for treble damages under [Section] 4 of the Clayton Act is injured within the meaning of [Section] 4 by the full amount of the overcharge paid by it," and that a defendant "is not permitted to introduce evidence that indirect purchasers were in fact injured by the illegal overcharge" because the direct purchaser passed it on by increasing its own price. *Illinois Brick*, 431 U.S. at 724-725. The Court then held that an indirect-purchaser plaintiff is similarly barred from predicating a Section 4 claim on an allegation that unlawful overcharges were passed on to it. The Court explained that "allowing offensive but not defensive use of pass-on would create a serious risk of multiple liability for defendants," who could be held liable to both direct and indirect purchasers for the same overcharge. *Id.* at 730. The Court added that the "principal basis" for its decision in *Hanover Shoe* had been the desire to avoid pass-on inquiries that would "greatly complicate and reduce the effectiveness of already protracted treble damages proceedings." *Id.* at 731-732. The Court concluded that this concern "ap-

plies with no less force to the assertion of pass-on theories by plaintiffs than it does to the assertion by defendants." *Id.* at 732.

Having held that offensive and defensive uses of pass-on analysis should stand or fall together, this Court stated that the *Illinois Brick* plaintiffs could not "recover on their pass-on theory" unless the Court "overrule[d] *Hanover Shoe*." 431 U.S. at 736. The Court declined to take that step. The Court stated that "[p]ermitting the use of pass-on theories under [Section] 4 essentially would transform treble-damages actions into massive efforts to apportion the recovery among all potential plaintiffs that could have absorbed part of the overcharge," ranging "from direct purchasers to middlemen to ultimate consumers." *Id.* at 737. The Court concluded that, "[h]owever appealing this attempt to allocate the overcharge might seem in theory, it would add whole new dimensions of complexity to treble-damages suits." *Ibid.*

c. In *Kansas* v. *UtiliCorp United Inc.*, 497 U.S. 199 (1990), public utilities sued natural-gas producers and a natural-gas pipeline company, alleging that those entities "had conspired to inflate the price of their gas in violation of the antitrust laws." *Id.* at 204. Kansas and Missouri sued the same defendants on behalf of residents who had purchased gas from the utilities, alleging that the utilities had passed on the overcharges by increasing their state-regulated gas prices. *Id.* at 204-205. The States argued that the Court should make an exception to the *Illinois Brick* rule for cases "involving regulated public utilities that pass on 100 percent of their costs to their customers." *Id.* at 208.

This Court declined to create that exception. It acknowledged that "[t]he rationales underlying *Hanover Shoe* and *Illinois Brick* will not apply with equal force in all cases," and that establishing the extent to which a direct purchaser has passed on an overcharge may be easier in some circumstances than in others. *UtiliCorp*, 497 U.S. at 216. The Court declined, however, to "carve out exceptions" for "particular types of markets." *Ibid.* (quoting *Illinois Brick*, 431 U.S. at 744). The Court explained that "[t]he possibility of allowing an exception, even in rather meritorious circumstances, would undermine the rule," *ibid.*, because the "process of classifying various market situations according to the amount of pass-on likely to be involved and its susceptibility to proof in a judicial forum would entail the very problems" that the *Illinois Brick* rule was adopted to avoid, *ibid.* (quoting *Illinois Brick*, 431 U.S. at 744-745).[2]

d. Although the *Illinois Brick* rule bars both offensive and defensive uses of pass-on analysis in treble-damages suits under Section 4, the rule is limited in two important respects.

First, the *Illinois Brick* rule does not apply to suits seeking injunctive relief under Section 16 of the Clayton Act, 15 U.S.C. 26. This Court's decisions disapproving the use of pass-on theories under Section 4 do not speak

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[2] This Court has left open the possibility of exceptions to the *Illinois Brick* rule in certain narrow circumstances. Those include cases in which "the direct purchaser is owned or controlled by its customer," and cases where "a pre-existing cost-plus contract" ensures that "the purchaser is insulated from any decrease in its sales as a result of attempting to pass on the overcharge." *Illinois Brick*, 431 U.S. at 736 & n.16; see *UtiliCorp*, 497 U.S. at 217-218. Those potential exceptions are not at issue in this case.

to whether particular conduct by defendants violates the antitrust laws; they are instead rooted in concerns specific to monetary relief. Suits by indirect purchasers seeking only injunctive relief do not raise the same concerns about "duplicative recovery" and "the complexity of apportioning damages." *Cargill, Inc.* v. *Monfort of Colo., Inc.*, 479 U.S. 104, 111 n.6 (1986); see, *e.g.*, *Campos* v. *Ticketmaster Corp.*, 140 F.3d 1166, 1172 (8th Cir. 1998), cert. denied, 525 U.S. 1102 (1999); *McCarthy* v. *Recordex Serv., Inc.*, 80 F.3d 842, 856 (3d Cir.), cert. denied, 519 U.S. 825 (1996).

Second, in the decades since *Illinois Brick* was decided, more than two-thirds of the States have allowed the use of pass-on analysis to apportion damages under their own antitrust laws, which otherwise generally parallel federal law. See Antitrust Modernization Commission, *Report and Recommendations* 268-269 (Apr. 2007) (*AMC Report*). This Court has held that those state laws are not preempted because the *Illinois Brick* rule "defin[es] what sort of recovery federal antitrust law authorizes" and does not "defin[e] what federal law allows States to do under their own antitrust law." *California* v. *ARC Am. Corp.*, 490 U.S. 93, 103 (1989). As a result, antitrust defendants now often face parallel damages actions brought by both direct purchasers (who sue under Section 4 of the Clayton Act) and indirect purchasers (who sue under state laws that authorize pass-on claims). *AMC Report* 269.

That regime of parallel federal and state antitrust litigation has proved to be complex and inefficient. See *AMC Report* 269-272. *Inter alia*, suits by direct and indirect purchasers seeking to recover the same overcharge create a risk of inconsistent results or duplica-

tive awards. *Id.* at 271-272. In addition, some commentators have concluded, based on the courts' experience with state-law indirect-purchaser claims, that the evidentiary complexities associated with pass-on analysis are not as great as this Court believed them to be when it decided *Hanover Shoe* and *Illinois Brick*. See, *e.g.*, *id.* at 277; 2A Phillip E. Areeda et al., *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 346k, at 219-227 (4th ed. 2014). The parties have litigated this case within the framework established by *Hanover Shoe* and *Illinois Brick*, however, and have not asked this Court to revisit those decisions.

***2. Respondents' treble-damages claim is barred by* Illinois Brick**

Respondents' complaint does not state a valid treble-damages claim under Section 4 because it is premised on the same sort of pass-on allegations that this Court found insufficient in *Illinois Brick*. Respondents allege that Apple monopolized the "distribution market for iPhone apps." Pet. App. 56a. They further allege that they "have been injured by Apple's anticompetitive conduct because they paid more for their iPhone apps than they would have paid" if developers had been allowed to sell their apps through other channels. *Id.* at 53a. According to respondents, the availability of alternative distribution channels would have forced Apple "to substantially lower its 30% [commission]," which would have led to lower app prices. *Id.* at 55a.

As the district court explained, respondents' asserted injury depends on a pass-on theory because the prices in the App Store are set by third-party app developers, not by Apple. Pet. App. 36a. When a developer that would otherwise price its app at $7 confronts Apple's 30% commission, it can increase the price to

$10, passing on the full amount of the commission to the customer, but losing sales. It can leave the price at $7, preserving sales volume but absorbing the entire commission itself. Or (in the most likely scenario) it can charge a price between $7 and $10 and pass on some but not all of Apple's commission.

The extent (if any) to which app purchasers are injured by Apple's allegedly supracompetitive commission, and by its refusal to allow developers to sell iPhone apps through other channels, thus depends on whether those Apple practices have caused developers to increase the prices charged for their apps in the App Store. To determine whether third-party app developers would have charged lower prices in a hypothetical market in which they were freed from Apple's allegedly unlawful practices, a court would need to conduct precisely the sort of pass-on analysis that the Court in *Illinois Brick* rejected. The district court therefore was correct in holding that respondents' treble-damages claim is barred by the *Illinois Brick* rule.[3]

3. *The court of appeals' analysis reflects a misreading of* Illinois Brick

The court of appeals "rest[ed] [its] analysis" on what it called "the fundamental distinction between a manufacturer or producer, on the one hand, and a distributor,

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[3] The district court dismissed respondents' complaint based on its holding that *Illinois Brick* bars their treble-damages claim. Pet. App. 37a. The complaint also includes a request for injunctive relief, *id.* at 63a, which respondents argued on appeal should be allowed to proceed even if their treble-damages claim cannot, Resps. C.A. Br. 53-54; see pp. 11-12, *supra*. The court of appeals had no occasion to address that argument, which will remain open on remand if this Court grants review and holds that *Illinois Brick* forecloses respondents' treble-damages claim.

on the other." Pet. App. 21a. The court held that respondents' Section 4 suit may proceed "[b]ecause Apple is a distributor" that sold iPhone apps "directly" to respondents. *Ibid.* That holding reflects a fundamental misunderstanding of the *Illinois Brick* rule.

a. The court of appeals observed that *Hanover Shoe*, *Illinois Brick*, and *UtiliCorp* all involved similar distribution chains, through which a manufacturer or producer sold or leased a product to an intermediate manufacturer or distributor, which either resold that product or used it to make the product that was sold to consumers (sometimes through other intermediaries). Pet. App. 16a. In *Hanover Shoe*, United leased shoe-making machines to Hanover, which used them to make shoes that were ultimately sold to retail customers. 392 U.S. at 483-484. In *Illinois Brick*, manufacturers of concrete blocks sold them to contractors, who used the blocks in providing construction services to Illinois and its local governments. 431 U.S. at 726. And in *UtiliCorp*, the natural-gas producers and pipeline company sold gas to utilities, which resold it to consumers. 497 U.S. at 204.

The court of appeals correctly recognized that, under this Court's decisions, the ultimate consumers in those three distribution chains could not bring Section 4 actions against the original manufacturers or producers, but could have sued the intermediate manufacturers or distributors with which they transacted if those intermediaries had violated the antitrust laws. Pet. App. 16a-17a. In *Illinois Brick*, for example, Illinois could not sue the allegedly price-fixing manufacturers of concrete blocks, but could have sued the general contractors if those contractors had conspired to fix the prices they charged the State for construction work.

The court of appeals went astray, however, in attempting to derive the governing legal rule from the particular facts of *Hanover Shoe*, *Illinois Brick*, and *UtiliCorp*, rather than from the stated rationale for this Court's holdings. This Court's decisions have neither recognized nor relied upon any "fundamental distinction between a manufacturer or producer * * * and a distributor." Pet. App. 21a. Instead, the Court has held that, in resolving questions of treble-damages liability under Section 4, courts should not attempt to determine whether the entity that paid an unlawful overcharge to the antitrust violator passed on that overcharge to others. In *Hanover Shoe*, the Court held that a Section 4 defendant is "not entitled to assert a passing-on defense." 392 U.S. at 494. In *Illinois Brick*, the Court again framed the question presented as concerning the "permissibility of pass-on arguments," and it extended *Hanover Shoe* to bar "the use of pass-on theories by plaintiffs" as well as by defendants. 431 U.S. at 731, 737. The *Illinois Brick* Court repeatedly recognized that the rule it applied precludes "the use of pass-on theories under [Section] 4." *Id.* at 737; see, *e.g.*, *id.* at 732, 745, 747.

In *Hanover Shoe*, *Illinois Brick*, and *UtiliCorp*, the consumers would not have needed to use pass-on theories in suits against the distributors or other intermediaries with which they transacted because those intermediaries set the prices the consumers paid. But this case is different. Although Apple acts as an intermediary or distributor, it does not buy apps from app developers and then resell them to consumers at prices of its choosing. Pet. App. 20a. Instead, it acts as an agent for the developers, completing sales on the developers' behalf at prices the developers set. *Id.* at 20a-21a, 36a.

That difference is critical to the proper application of the *Illinois Brick* rule. Respondents' claim of injury depends on the assertion that Apple's allegedly unlawful conduct caused developers to set App Store prices at levels higher than the developers otherwise would have chosen. That is at bottom an allegation of pass-on injury, even though Apple acts as an intermediary between app developers and consumers and has contractual relationships with both.

b. By focusing solely on Apple's status as a distributor, the court of appeals effectively mandated the inquiry that the *Illinois Brick* Court sought to avoid. To prove damages, respondents would need to establish the extent to which Apple's allegedly unlawful practices have caused developers to set higher prices for their apps than they otherwise would have. That is precisely the pass-on inquiry this Court has disapproved. See *Illinois Brick*, 431 U.S. at 737, 743; *Hanover Shoe*, 392 U.S. at 492-493.

Respondents appear to acknowledge (Br. in Opp. 11) that Apple could seek to reduce any damages award by showing that a lower commission would not have resulted in lower app prices. But respondents assert (*ibid.*) that those issues "relating to the measure and amount of damages" are not relevant to the application of *Illinois Brick*. That is incorrect. In fact, the square holding of *Illinois Brick* is that courts in Section 4 cases should not conduct what this Court deemed to be unacceptably complicated inquiries about how to "apportion the recovery" among the various parties in the chain of distribution. *Illinois Brick*, 431 U.S. at 737.

c. Respondents do not appear to defend the court of appeals' distributor-function rule. Consistent with the opinion below, however, respondents argue that they

qualify as "direct purchasers" under *Illinois Brick* because they bought iPhone apps "directly" from Apple. Pet. App. 21a-22a; see Br. in Opp. i, 6, 11. That argument is unpersuasive for two related reasons.

First, the term "direct purchaser" as used in *Illinois Brick* must be understood in light of this Court's holding that Section 4 does not permit "the use of pass-on theories." *Illinois Brick*, 431 U.S. at 737. In *Illinois Brick* and *UtiliCorp*, the Court used the term "direct purchaser" to describe a party that bears an antitrust violator's unlawful overcharge in the first instance, and the term "indirect purchaser" to describe a party that bears such an overcharge only to the extent it is passed on by others. See, *e.g.*, *UtiliCorp*, 497 U.S. at 206-208; *Illinois Brick*, 431 U.S. at 724-726. The Court has consistently focused on the evidentiary complexities and other problems associated with pass-on analysis—not on "directness" in any other sense. And the Court's opinion in *Hanover Shoe*—the source of the *Illinois Brick* rule—did not use the terms "direct purchaser" and "indirect purchaser" at all.

Second, this Court has used the term "direct purchaser" not to encompass every party that had some direct dealings with the monopolist, but rather to describe the party that first purchased *the monopolized good or service*. Respondents do not fit that description. Respondents allege that Apple has monopolized the "distribution market for iPhone applications." Pet. App. 41a; see *id.* at 43a, 48a-49a, 56a. But although respondents and other iPhone users deal directly with Apple in purchasing *apps* through the App Store, they are not direct purchasers of Apple's *app-distribution services*. Instead, app developers purchase those services from Apple in the first instance by entering into contracts in

which Apple agrees to distribute their apps in exchange for 30% of the proceeds from each sale. *Id.* at 36a.

This case is thus analogous to *Hanover Shoe*. Just as shoe-making machines were a "necessary input" for Hanover and other shoe manufacturers, *Campos*, 140 F.3d at 1171, distribution services are a necessary input for app developers' sales of their apps to the public. If, as respondents allege, Apple has monopolized the market for distribution services, the immediate consequence is that developers cannot obtain those services elsewhere and must instead acquire them on Apple's terms—that is, by agreeing to pay Apple's 30% commission. Any increase in the app prices charged to iPhone users like respondents is a result of app developers' decisions to pass on all or part of that commission in setting their prices.

Respondents and other iPhone users are thus "indirect purchasers" as the *Illinois Brick* Court used that term. Those consumers "only buy [Apple's distribution] services because [app developers] have been required to buy those services first," *Campos*, 140 F.3d at 1171, and they bear the cost of Apple's 30% commission only to the extent that developers choose to pass it on. As the Eighth Circuit explained, "such derivative dealing is the essence of indirect purchaser status." *Ibid.*

B. The Decision Below Conflicts With The Eighth Circuit's Decision In *Campos*

The court of appeals correctly recognized that its decision conflicts with the Eighth Circuit's decision in *Campos*, a case "closely resembling" this one. Pet. App. 18a.

1. In *Campos*, purchasers of concert tickets sued Ticketmaster, alleging that it was "a monopoly supplier of ticket distribution or ticket delivery services to large-scale popular music shows." 140 F.3d at 1168. As in this case, the plaintiffs alleged that Ticketmaster had used

its monopoly position to extract "supracompetitive fees," which were set in contracts between Ticketmaster and concert venues. *Id.* at 1169. And as in this case, Ticketmaster functioned as a distributor and dealt directly with the plaintiffs, who paid both the nominal ticket prices and the added fees "directly to Ticketmaster." *Id.* at 1171.[4]

The Eighth Circuit held that the plaintiffs' claim was barred by *Illinois Brick* because it rested on the assertion that concert venues were passing on Ticketmaster's fees in setting their ticket prices (which determined the total price that concertgoers actually paid). *Campos*, 140 F.3d at 1171-1172. The court explained that concert venues would be free to raise nominal ticket prices if Ticketmaster lowered its fees, and that determining the extent of the plaintiffs' injury from Ticketmaster's allegedly supracompetitive fees therefore would require the sort of pass-on analysis that *Illinois Brick* precludes. *Ibid.*

If respondents' suit had been brought in the Eighth Circuit, it would have been foreclosed by *Campos*. Conversely, the court of appeals in this case "disagree[d]" with the Eighth Circuit's approach and made clear that it would have reached the opposite result if it had been presented with the facts of *Campos*. Pet. App. 19a. Like Apple, Ticketmaster functioned as a "distributor" and dealt directly with the plaintiffs. It therefore would have been subject to a Section 4 treble-damages suit under the court of appeals' conception of the *Illinois Brick* rule.

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[4] Unlike Apple's commission, Ticketmaster's fees were separately identified as additions to the nominal ticket price. *Campos*, 140 F.3d at 1169, 1171.

2. Respondents assert (Br. in Opp. 14) that, although the court of appeals criticized the Eighth Circuit's decision in *Campos*, "[t]he difference in outcomes in the two cases" stems from "different factual allegations" rather than from any legal disagreement. But the court of appeals emphasized that it "d[id] not rest [its] analysis" on the specifics of respondents' allegations or on the details of the App Store's operations. Pet. App. 20a. Instead, the court held that *Illinois Brick* does not prohibit consumers from suing "a distributor" with which they dealt "directly," even if their asserted injury depends on an allegation that an unlawful overcharge imposed on a third party was passed on to them. *Id.* at 21a. That legal holding is incorrect and squarely conflicts with the Eighth Circuit's decision in *Campos*.

C. The Question Presented Warrants This Court's Review

Although the circuit conflict created by the court of appeals' decision is shallow and recent, it nonetheless warrants this Court's review. The application of the *Illinois Brick* rule to agency or consignment sales models like Apple's will significantly affect the private enforcement of federal antitrust law, in part because other existing and emerging e-commerce platforms use similar models. See Pet. 29-31. The importance of the question presented will only grow as commerce continues to move online. The Ninth Circuit is home to a disproportionate share of the Nation's e-commerce companies, and its erroneous decision creates uncertainty and a lack of uniformity about the proper application of Section 4 to this increasingly common business model. This Court should grant certiorari and correct the Ninth Circuit's error.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MAY 2018